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No. 02-1241

In The

Supreme Court of the United States

ARMOND RUSS, in his official capacity as the Commissioner of the Kentucky Department for Facilities Management,

Petitioner,

v.

Rabbi JONATHAN ADLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming a permanent injunction preventing Kentucky officials from erecting on the State Capitol grounds a six-foot by four-foot monument dominated by the text of one version of the Ten Commandments?

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STATEMENT OF THE CASE

The State Capitol, located in Frankfort, is the seat of the Commonwealth of Kentucky's governmental power. It contains the State Senate, House of Representatives, Supreme Court and Governor's office. [Petitioner Appendix (Pet. App.) 25.] The focal point of the surrounding State Capitol grounds is the floral clock, "a prominent and central feature" that "attracts attention." [Pet. App. 45.] The floral clock "is thirty-four feet in diameter and weighs over 200,000 pounds." [Pet. App. 45.]

In 2000, the General Assembly enacted, and Governor Paul Patton signed, Senate Joint Resolution (SJR) 57, which compelled the placement of a Ten Commandments monument next to the floral clock. [*See* Pet. App. 2, 57-65.]

The Ten Commandments monument "is a stone marker that is over six feet tall and almost four feet wide."[1] [Pet. App. 44.] The Fraternal Order of Eagles gave it to the Commonwealth in 1971 and the Commonwealth displayed it until about 1980, when it removed the monument to make room for construction. [Pet. App. 3, 5.] The monument has remained in storage since then. [Pet. App. 5.][2]

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[1] In addition to one version of the text of the Ten Commandments, the monument's border "is inscribed with the Star of David, the Chi Rho, the 'all-seeing eye' inside a pyramid, an eagle, and a flag." [Pet. App. 5.]

[2] SJR 57 thus is wrong when it says that the monument "was displayed on the Capitol grounds for nearly three decades. . . . " [Pet. App. 5; *see* Pet. App. 65.]

SJR 57 recites its legislative purposes in seventeen "Whereas" clauses. [Pet. App. 57-63.] Two clauses effectively "conclude that the Supreme Court has declared the United States to be a 'Christian nation.'" Ten other clauses "quote famous Americans professing their beliefs in the Bible, God, or Christianity." Four others "incorporate miscellaneous quotations regarding God or the Bible in pre-Revolutionary legislative sources or in Kentucky law." The final clause "implies that the text of the Ten Commandments appears in the U.S. Supreme Court chambers as part of a frieze which contains several depictions of historical law givers." [Pet. App. 44.]

SJR 57 requires that the monument be placed on the Capitol grounds near the floral clock. [Pet. App. 2.] The district court – whose chambers are within a mile of that site – summarized the significance of the location as follows:

> The floral clock area is a prominent and central feature on the Capitol grounds. The floral clock can be seen from the circular drive that leads up to the Capitol plaza and the public parking area. In fact, this position is such a focal point for the area that the State has chosen this location for a bronze plaque, which welcomes visitors to the State Capitol. . . .
>
> In addition to the centralized location, the floral clock located in this area attracts attention. The clock is thirty-four feet in diameter and weighs over 200,000 pounds. It is surrounded by seven other smaller memorials that emphasize the State's pride in the citizens, veterans, and public servants to whom said memorials are dedicated. If the "Ten Commandments Monument" were to be relocated to this area of the

> Capitol grounds, it would be the largest monument in the area, except for the floral clock. Both the floral clock and the "Ten Commandments Monument" would be visible to motorists driving on the road between the Capitol and the Capitol Annex.

[Pet. App. 45.][3]

In July 2000, the American Civil Liberties Union and five individuals, including a rabbi and three ministers, filed suit in the United States District Court for the Eastern District of Kentucky. They alleged that SJR 57, which compelled the placement of the Ten Commandments monument at a central location on the Capitol grounds, violated the First Amendment's establishment clause. The district court consolidated its hearing on the preliminary injunction motion with trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). On July 27, 2000, the district court issued its memorandum opinion, order and judgment declaring SJR 57 unconstitutional and permanently enjoining Armond Russ, Commissioner of the Department for Facilities Management, from erecting the Ten Commandments monument. [Pet. App. 43-54.]

A divided panel of the Sixth Circuit affirmed. [Pet. App. 1-42.] The majority found that the articulated purposes for SJR 57 were not secular, did not justify placing the Ten Commandments – a sacred and religious text for

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[3] By contrast, the other memorial plaques are placed parallel to ground level or on a small pedestal. They are tiny compared to the Ten Commandments monument: "[T]he sheer dimensions of this granite monolith would dwarf all the other memorials to deceased veterans and dedicated public servants in the vicinity." [Pet. App. 51.]

Jews and Christians – at the focal point of the State Capitol grounds, and thus violated the first prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). [Pet. App. 13-21.] The majority also held that placement of the Ten Commandments monument would violate the endorsement test under *Lemon*'s second prong, because a reasonable observer would deem the monument, in context, as an endorsement of religion. [Pet. App. 22-33.] Judge Batchelder dissented on ripeness grounds. [Pet. App. 35-42.]

REASONS FOR DENYING THE WRIT

Review is inappropriate for three reasons. First there is no conflict among the circuits. The Sixth Circuit's opinion is consistent with two decisions from the Seventh Circuit, *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002), and *Books v. City of Elkhart, Indiana*, 235 F.3d 292 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2002). No federal court of appeals has issued a conflicting decision since this Court denied review from the two Seventh Circuit cases. The petitioner does not argue otherwise.

Second, the Sixth Circuit correctly applied settled establishment clause law in finding that the legislature's articulated purposes for enacting SJR 57 are not secular and that the effect of placing a six-foot by four-foot Ten Commandments monument at the focal point of the State Capitol grounds is to impermissibly endorse religion. The petitioner merely seeks to correct what he perceives to be an incorrect application of well-settled principles of law.

Third, the petitioner's claim that this case was not ripe for decision ignores the factual record (and petitioner's own

argument) in the courts below. That record detailed the precise content and physical context of the Ten Commandments display, which petitioner argued was constitutional. Again, the petitioner merely seeks to correct what he perceives to be a premature application of well-settled principles of law.

ARGUMENT

I. There Is No Significant Conflict In The Federal Appeals Courts.

This Court has considered the constitutionality of government Ten Commandments displays only once. In *Stone v. Graham*, 449 U.S. 39 (1980), the Court summarily struck down a Kentucky statute requiring each public school to post the Ten Commandments on classroom walls. Although each display was to include a disclaimer that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States," *id.* at 41, the Court held that the statute lacked a secular legislative purpose because:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths. The Commandments do not confine themselves to arguably secular matters. . . . Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Id., 449 U.S. at 41-42 (footnote and citations omitted); *see id.*, 449 U.S. at 42 (referring to the Ten Commandments as a "religious text[ ]").

The courts of appeals have consistently shared and applied this understanding of *Stone*. Here, the Sixth Circuit deemed Kentucky's articulated "secular purpose" but a variation on the *Stone* theme. Because Kentucky's purpose, as reflected in SJR 57's text, is conceptually identical to Ky. Rev. Stat. § 158.178(2)'s purpose, *Stone* conclusively established that the asserted secular purpose "cannot blind" the courts to the obvious sacred nature of the legislative command. "The pre-eminent purpose for posting the Ten Commandments . . . is plainly religious in nature." *Stone*, 449 U.S. at 41.

In *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002), the Seventh Circuit applied *Stone* to find that Indiana lacked a valid secular purpose for maintaining a Ten Commandments monument at the Indiana Statehouse. *See id.*, 259 F.3d at 770-71 ("the Ten Commandments is a religious and sacred text that transcends secular ethical or moral concerns"). And in *Books v. City of Elkhart, Ind.*, 235 F.3d 292 (7th Cir.), *cert. denied*, 532 U.S. 1058 (2002), the Seventh Circuit applied *Stone* to enjoin a city's similar Ten Commandments display. *Id.*, 235 F.3d at 302 (the Ten Commandments cannot "be stripped of their religious, indeed sacred, significance and characterized as a moral or ethical document").

No court of appeals case since *Stone* has conflicted with the Sixth and Seventh Circuits' application of that decision.[4] No other circuit has issued a Ten Commandments decision since this Court denied review in *O'Bannon* and *Books*. And the petitioner does not argue that any conflict in application warrants this Court's review.

II. The Sixth Circuit Correctly Applied This Court's Cases To Hold That SJR 57 Lacks A Valid Secular Purpose And Has The Impermissible Effect Of Endorsing Religion.

A. Kentucky Seeks Plenary Review Merely To Challenge The Sixth Circuit's Application Of Established Law To Particular Facts.

A Ten Commandments display's constitutionality under the establishment clause must be gauged by the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). To survive scrutiny under *Lemon*, publicly displayed religious text must have a valid secular purpose and must not foster nor discourage religion or religious

[4] Seven years before *Stone*, the Tenth Circuit held that the Ten Commandments are not primarily religious in nature. *See Anderson v. Salt Lake City*, 475 F.2d 29, 34 (10th Cir. 1973). That court has since questioned *Anderson*'s continued vitality. *See Summum v. Callaghan*, 130 F.3d 906, 910 n.2 (10th Cir. 1997) ("Since *Anderson* was decided, however, more recent cases, including a Supreme Court case, cast doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature"); *id.*, 130 F.3d at 912 n.8 ("our decision in *Anderson* has been called into question by the Supreme Court in *Stone*") (citations omitted).

beliefs.[5] *Id.* Governmental action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

In *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), a majority of this Court adopted the endorsement analysis contained in Justice O'Connor's *Lynch* concurrence. That analysis modified *Lemon*'s "effects" prong to ask "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (Justice O'Connor, concurring); *County of Allegheny*, 492 U.S. at 562. *See also Sante Fe Independent School District v. Doe*, 530 U.S. 290, 307 (2000) (focusing on "[t]he actual or perceived endorsement of the message"). In determining whether an endorsement exists, courts must focus on the precise factual context because, for example, "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 690 (Justice O'Connor, concurring). "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement. . . . " *Lynch*, 465 U.S. at 694 (Justice O'Connor, concurring). Thus,

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[5] *Lemon* contains a third prong, asking whether the challenged display fosters excessive entanglement. In *Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000) (plurality opinion), the plurality noted that to some extent *Lemon*'s "excessive entanglement" prong had been absorbed into the "primary effect" prong. This refining of *Lemon* is not relevant here because the respondents have never claimed that the challenged Ten Commandments monument creates an "excessive entanglement."

whenever courts determine whether a specific governmental practice, in context, violates the establishment clause, "the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678.

The Sixth Circuit properly recognized that these principles governed the establishment clause analysis by which SJR 57 must be gauged. [Pet. App. 11-13.] Kentucky objects merely because, in its estimation, the Court of Appeals applied this settled law wrongly or too soon. Given the express purposes of the resolution, and given that the Ten Commandments monument would be the only element added to an already-existing context, the Sixth Circuit's application of settled law to unique facts is not grounds for plenary review. And, in any event, the Court of Appeals applied the law correctly.

B. The Sixth Circuit Correctly Found That SJR 57 Lacked A Valid Secular Purpose And That The Ten Commandments Monument, In Context, Endorsed Religious Belief.

1. The Sixth Circuit Properly Found That The Resolution Lacked A Valid Secular Purpose.

Where "a governmental intention to promote religion is clear," *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987), this Court has not hesitated to hold the challenged conduct unconstitutional. Thus, the Court has invalidated Louisiana's creationism statute, *Aguillard*; struck down a Kentucky law requiring the posting of the Ten Commandments in public schools, *Stone*; struck down Alabama's moment of silence statute, *Wallace v. Jaffree*, 472 U.S. 38 (1985); and held unconstitutional the mandated daily reading of Bible verses and the Lord's Prayer in

public schools. *Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). Significantly, in each of those cases, this Court held that the challenged conduct was motivated by a religious purpose, and disregarded the government's assertion of a sincere nonreligious purpose.

Nor is the requirement of a secular purpose "satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691 (Justice O'Connor, concurring). While a government's professed secular purpose for an arguably religious policy is entitled to "some deference," it is "the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 75) (brackets supplied in *Santa Fe Indep. Sch. Dist.*).

The appeals court correctly concluded that the resolution's stated purpose is not secular. At its core, SJR 57 demands that the Ten Commandments monument be erected "to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth." [Pet. App. 65.] But that purpose is not secular, for this Court rejected Kentucky's similar assertion twenty years ago.

In *Stone*, 449 U.S. 39, this Court summarily struck down a Kentucky statute requiring schools to post copies of the Ten Commandments. Kentucky's statute required that each Ten Commandments display include the following disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Ky. Rev. Stat. § 158.178(2) (1980), quoted in *Stone*, 449 U.S. at 41. This Court was unpersuaded: "The Ten Commandments are

undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone*, 449 U.S. at 41 (footnote omitted). SJR 57 is but a variation on that theme.

Because SJR 57's "Biblical foundations of the laws of the Commonwealth" is conceptually identical to Ky. Rev. Stat. § 158.178(2)'s "fundamental legal code of Western Civilization and the Common Law," *Stone* conclusively establishes that the resolution's asserted secular purpose "cannot blind" this Court to the obvious sacred nature of the legislative command. "The pre-eminent purpose for posting the Ten Commandments . . . is plainly religious in nature." *Stone*, 449 U.S. at 41.

This articulated legislative purpose is no more secular than that struck down in *Stone*; to the contrary, as the district court noted, the legislature's purpose of "re-mind[ing] Kentuckians of the Biblical foundations of the law of this Commonwealth" is not validly secular because the "display is unaccompanied by any other historical documents evidencing the myriad of influences that shaped our current body of law." [Pet. App. 48.][6]

Moreover, the resolution's preamble dispels any notion of secular purpose. SJR 57 does eight things, one of which – compulsory monument display – is at issue here.[7]

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[6] Perhaps recognizing that *Stone* dooms any "secular purpose" argument, the Commonwealth makes no effort to address this point. Instead, the Commonwealth argues only that the case was not ripe for decision.

[7] The resolution also "finds" the Ten Commandments to be "the precedent legal code of the Commonwealth," requires the resolution's

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And it explains why it does those things – that is, it recites legislative purpose – in the preamble, consisting of seventeen "Whereas" clauses. Two of the seventeen clauses reciting legislative purpose involve Supreme Court decisions. One criticizes modern establishment clause jurisprudence, asserting that "the Framers never intended the First Amendment to be so interpreted as to remove the Bible from public school classrooms." [Pet. App. 58 (citing writings of Congressman Fisher Ames).] The other mistakenly implies that in 1892 this "Court, in a unanimous decision which has never been overruled," declared this to be a "Christian nation." [Pet. App. 60 (alluding to *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892))].[8] Ten others recite famous Americans' veneration for the Bible, God or Christianity.[9] Four allude to the miscellaneous mention of God or the Bible in Kentucky law or pre-Revolutionary legislative matters. The last recites the Ten Commandments' appearance in the Supreme Court.[10] As the district court noted,

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posting along with the monument, requires distribution of the resolution and other materials and permits the posting of the Ten Commandments in classrooms and other public buildings. [Pet. App. 63-65.]

[8] *Church of the Holy Trinity* was not a First Amendment case, but an immigration case. In the course of deciding a question of statutory construction, this Court said in dictum that this is a Christian nation.

[9] SJR 57 cites statements or writings by Samuel Adams, George Washington, Andrew Jackson, John Quincy Adams, Abigail Adams, Woodrow Wilson, Jimmy Carter and George Bush.

[10] SJR 57 implies that the text of the Ten Commandments appears in the courtroom, rather than that the frieze contains several depictions of historical "law givers," including one showing Moses carrying two tablets.

> the Resolution tends to create an exclusive display, rather than an "historical and cultural" perspective of the history of our laws. The entire preamble to the Resolution cites only Christian sources of law. By including the Resolution in the display, viewers will tend to leave with the impression that the Commonwealth of Kentucky endorses the opinion that Christianity is the central foundation of our law. The Resolution extols the virtues of the Christian beliefs promulgated by the Bible. By including a copy of the Resolution along with the display of the monument, the legislation's religious intent is . . . clearly evident. . . .

[Pet. App. 48 n.1.]

Finally, courts "not only can, but must, include an examination of the circumstances surrounding [the legislative] enactment." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 318. Here, those circumstances reveal the innately sectarian backdrop to SJR 57's enactment. In 1999, local governments throughout Kentucky posted the Ten Commandments in courthouses, schools and other public buildings. These local governments invited legal challenges and three received them amid wide publicity. *See ACLU of Kentucky v. McCreary County*, 96 F.Supp.2d 679 (E.D. Ky. 2000) (preliminarily enjoining Ten Commandments display in county courthouse); *ACLU of Kentucky v. Pulaski County*, 96 F.Supp.2d 691 (E.D. Ky. 2000) (same); *Doe v. Musselman*, 96 F.Supp.2d 667 (E.D. Ky. 2000) (preliminarily enjoining Ten Commandments display in public schools).

While those cases were pending, the state legislature convened. "Ten Commandments" legislation was high on the legislative agenda, generating several bills and widespread public debate and commentary. Ultimately, the

legislature enacted SJR 57, with its direct challenge to modern establishment clause jurisprudence and candid embrace of 100-year-old sectarian dictum. Under these well-publicized circumstances, the Commonwealth "nevertheles[s] ask[ed the courts] to pretend that [it] d[id] not recognize what every [Kentuckian] underst[ood] clearly – that this [resolution was] about prayer." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 318.

For each of these reasons, then, SJR 57 lacks a valid secular purpose. The resolution's articulated purpose is plainly religious. The Commonwealth's "precedent legal code" assertion has already been rejected by this Court as religious. And the context in which SJR 57 was enacted only highlights the legislature's religious purposes. SJR 57 therefore violates *Lemon*'s purpose prong and the Sixth Circuit was correct in so holding.

2. The Sixth Circuit Properly Found That, By Mandating Erection Of The Ten Commandments Monument Near The Floral Clock, SJR 57's Primary Effect Was To Endorse Religion.

Lemon also requires that a publicly displayed religious symbol have a primary effect that neither fosters nor discourages religion. *Lemon*, 403 U.S. at 612-13. This second or "endorsement" prong requires scrutiny of the display's environment or context, for the establishment clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S. at 593. Endorsement of religion is impermissible because it gives a "message to nonadherents that they are outsiders, not full members of the political community,

and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (Justice O'Connor, concurring).

At issue here, then, is whether SJR 57's compelled display of the Ten Commandments similarly and impermissibly endorses religion. For the following reasons, the Sixth Circuit correctly found that it does.

To begin with, the Ten Commandments are of a completely different ilk than memorial plaques, a floral clock, or a "Welcome to Kentucky" sign. They do not commemorate important Kentuckians. They do not celebrate Kentucky's political heritage.[11] The Commandments

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[11] To be sure, Kentucky's historical and political leaders, like the nation's Framers, undoubtedly read and knew of the Ten Commandments. But, as historians have noted, those who created the Constitution and Bill of Rights studiously avoided any religious references:

> God and Christianity are nowhere to be found in the American Constitution, a reality that infuriated many at the time. The U.S. Constitution, drafted in 1787 and ratified in 1788, is a godless document. Its utter neglect of religion was no oversight; it was apparent to all. Self-consciously designed to be an instrument with which to structure the secular politics of individual interest and happiness, the Constitution was bitterly attacked for its failure to mention God or Christianity. Our history books usually describe in great detail the major arguments made against the federal Constitution by its Anti-Federalist opponents; it meant death to the states and introduced an elitist Senate and a monarchical presidency. They seldom mention, however, the concerted campaign to discredit the Constitution as irreligious, which for many of it opponents was its principal flaw.... [T]his underremembered controversy of 1787-88 over the godless Constitution was one of the most important public debates ever held in America over the place of religion in

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derive from the Old Testament, Exodus 20:2-17 and Deuteronomy 5:6-21. Jewish tradition teaches that the Ten Commandments were given by God to Moses on Mt. Sinai (about 3200 years ago). For this reason, many Christians and Jews deem the Ten Commandments sacred.[12] Although the Ten Commandments can be divided into groupings that concern God and those that do not, believers see the Ten Commandments as a unitary document, given to humans by their deity, and held together by their initial pronouncement that "I am the Lord thy God."

The Ten Commandments undoubtedly represent an important code of human conduct and behavior, but they are hardly unique. The Code of Hammurabi, the earliest compilation of Babylonian law (*circa* 2200 B.C.E.), predated Mosaic law by 1000 years. THE HAMMURABI CODE (trans. Chilperic Edwards) (1904), p. 120. Indeed, the Ten Commandments were derived from the Code of Hammurabi and two dozen passages in Exodus are substantially identical to sections in the Code of Hammurabi. *Id.* at 123-30. Like the Ten Commandments, the Code of Hammurabi prohibited killing, adultery, stealing, and

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politics. The advocates of a secular state won, and it is their Constitution we revere today.

Isaac Kramnick And R. Laurence Moore, The Godless Constitution – The Case Against Religious Correctness 27-28 (1996).

[12] There are at least three versions of the Ten Commandments in use by Jews, Catholics and Protestants. Among other differences, the Jewish version prohibits "murder" as opposed to "killing." The Protestant version bans the making of graven images, a provision absent from the Catholic version. *See generally*, Steven Lubet, *The Ten Commandments in Alabama*, Constitutional Commentary, pp. 471, 475 (Winter 1988).

bearing false witness. *Id.* at 3, 6, 8, 21-22, 129, 153, 206-07, 209-10, 259-60.

Other ancient codes similarly prohibited such things as murder, theft, adultery and perjury. *See* The Hittite Laws (E. Neufeld trans.) (1951) [Cuneiform fragments of Hittite laws written *circa* 1370 B.C.E. prohibit homicide, theft and adultery]; Albert Kocourek & John H. Wigmore, Source Of Ancient And Primitive Law 469-99 (1915) [the Laws of Manu (Hindu), created *circa* 1100 B.C.E., prohibited murder, adultery, theft and perjury]; Ilias Arnaoutoglou, Ancient Greek Laws: A Sourcebook 22-23, 70-73 (1998) [Athenian law of the 6th Century B.C.E. prohibited adultery, theft, murder and other forms of homicide]; 1 The Civil Law 57-77 (S.P. Scot trans.) (1932), 11 The Civil Law 29-46 [Roman law prohibited murder, theft, perjury and adultery]; A.F.P. Hails, Remnants Of Ch'in Law 120-131, 138-40, 146-49, 168-69 (1985) [Ch'in Dynasty, *circa* 7th Century B.C.E., prohibited theft, falsely denouncing someone as a criminal, killing without authorization and adultery]. Nor is it surprising that many moral codes, including those predating the Ten Commandments, contain similar secular rules, for without basic prohibitions on murder and stealing life would be "nasty, brutish, and short." Thomas Hobbes, Leviathan 107 (Herbert W. Schneider, ed., Bobbs Merrill 1958) (originally published in 1651).[13]

[13] Nor can the Ten Commandments be described as a unique foundational document for American law in general. American law is based on English law, which derives from Roman, Anglo-Saxon, and Norman law, which in large part ignored Mosaic law as applying only to Jews. *See* Lawrence Friedman, A History Of American Law 15 (1973);

(Continued on following page)

Because the Ten Commandments are a recognized code of human conduct, the Commonwealth might elect to include them in an appropriate educational display on moral codes. *See Stone*, 449 U.S. at 42 (noting, in striking down required posting of Ten Commandments in Kentucky schools, that "[t]his is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. . . . ") In such a display of various behavioral codes throughout history, a reasonable observer likely would not deduce that the government endorsed the Ten Commandments over other moral codes. Indeed, Justice Stevens, concurring in *Allegheny*, noted as much:

> For example, a carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." . . . Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great

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Bernard J. Mislin, Jewish Law In American Tribunals 1, 25-28 (1976); Max Radin, Handbook Of Anglo-American Legal History 1-5 (1936).

> proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would be to exclude religious paintings by Italian Renaissance masters from a public museum.

Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring) (footnote and internal citations omitted).

SJR 57's Ten Commandments display is not a display of "lawgivers." Nor does it purport to represent a sampling of great moral codes. The Ten Commandments monument would contain the only religious text and the only moral code displayed on the capitol grounds. Nor would the display expose Kentuckians to the teachings of the world's great cultures and religions, for only one version of the Ten Commandments is displayed. The Ten Commandments are religious, first and foremost. They are sacred to those who worship them as the word of God. And displaying the Ten Commandments within proximity of memorial plaques does not make the Ten Commandments like them.

Nor is the monument's inherent religious nature diminished by its physical context. The presence of the Star of David, a flag, an eagle and the "all-seeing" eye do not neutralize the religious effect of the Ten Commandments monument. As for the Star of David, simultaneous endorsement of two religions "is no less constitutionally infirm than the endorsement of Christianity alone." *Allegheny*, 492 U.S. at 615. The flag, eagle and "all-seeing" eye are small in comparison to the Commandments' text. In addition, the three figures are incorporated into the monument's decorative border obscuring them further. The reasonable person viewing the Ten Commandments monument does not see a collection of texts and figures, but a six-foot by four-foot stone tablet, erected on the

Capital grounds, proclaiming "I AM the LORD thy God." (Emphasis in original.) The effect of such a display is clearly religious.[14]

The proposed location of the Ten Commandments monument ensures that the effect of the display will be to endorse religion. The monument is to be placed in what the Commonwealth characterized below as a "monument garden" near Kentucky's floral clock. But the Ten Commandments monument would dwarf all other flowers in the garden. [Pet. App. 51.] The monument is four feet across and more than six feet high. The seven "historical" markers in the floral clock area are relatively small, flat bronze rectangles set in the ground or on small pedestals. Only the floral clock even remotely approaches the Ten Commandments monument's size. Thus, the Ten Commandments monument, with its dominant size and imposing text, will be the focal point of the display, as the district court expressly found:

> [T]he prominent placement of the monument would further support the reasonable person's conclusion that the Commonwealth endorsed Christian values. This high traffic area is located near a famous Kentucky landmark. . . . It is with

[14] SJR 57 also requires that the resolution's text be displayed along with the monument. [Pet. App. 65.] But rather than distancing the Commonwealth from the blatantly religious message of the Ten Commandments, the resolution reinforces the overwhelmingly Christian theme of the display. The resolution proclaims Biblical scripture as the cornerstone of American jurisprudence, quotes American political leaders praising the Bible and generally lauds the role of religion in American life. The resolution thus highlights the impression that the Commonwealth "endorses Christian influences to the exclusion of those from other religious and secular sources." [Pet. App. 48.]

> great pride that the Commonwealth displays this clock on Capitol grounds, in the direct proximity of the bronze plaque that welcomes visitors to the State Capitol. The monument's placement would indicate that the Commonwealth approved of the display and the full panoply of its religious content.
>
> [T]he size of this monument further indicates the importance placed on the Biblical message contained in this display. While the floral clock is clearly larger and probably more eye catching than the monument in question, the monument would not be viewed as simply another object in a "monument garden." The facts clearly indicate that the sheer dimensions of this granite monolith would dwarf all the other memorials to deceased veterans and dedicated public servants in the vicinity.

[Pet. App. 50-51.] The sum effect of this display is an unconstitutional endorsement of religion.

Nor does SJR 57 place the Ten Commandments far from the seat of power. Indeed, rather than incorporating the monument into a pre-existing monument garden elsewhere in the Commonwealth, the General Assembly deliberately chose to place the Ten Commandments within 100 yards of the seat of all three branches of Kentucky state government. The proximity of the Capitol to the proposed monument leaves little doubt that the

Commonwealth endorses, approves and condones a display of purely religious text on its property.[15]

The American historical experience recognizes many religious faiths and personal philosophies. By contrast, SJR 57's mandated display of the Ten Commandments endorses one religious belief system. This contravenes what this Court has noted is our real heritage:

> This nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. . . .
>
> Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . "

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[15] The Commonwealth now appears to have abandoned all efforts to argue that the Ten Commandments display would not endorse religion. Instead, picking up on a suggestion made for the first time by the dissenting judge below during rebuttal argument, the Commonwealth suggests that the case is not ripe because one must speculate about the other components of the Ten Commandments display. But this ignores the record below and the Commonwealth's consistent position before the district and circuit courts. The record reflects that SJR 57 mandated *adding* the Ten Commandments monument (and the Resolution's text) to an already-existing "monument garden" – to wit, the existing State Capitol grounds. Thus, the courts below had no need to speculate about context; the record described in detail the existing grounds and the precise physical location of the Ten Commandments display. The context thus was fully described in the record and the issue was "fit[ ] . . . for judicial decision." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

> Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."

County of Allegheny, 492 U.S. 573, 590 (1989) (quoting *Wallace*, 472 U.S. at 52). The legislature's mandate that Kentucky erect a Ten Commandments monument flies in the face of this diversity and our national heritage. The appeals court correctly found it to be unconstitutional.

CONCLUSION

Certiorari is not warranted. The Court of Appeals' analysis conformed to the context-based inquiry demanded by this Court. There is no meaningful conflict with decisions of another circuit court. And because the record detailed the precise location and elements of the Commonwealth's Ten Commandments display, the case was ripe for decision. Because there are no grounds for granting plenary review, this Court should deny the petition for a writ of certiorari.

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